Office-Supreme Court, U.S.
FILED
JUL 24 1985
ALEXANDER L. STEVAS

85-147

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

Southwest Chemical Services, Inc.

Petitioner,

v.

The Superior Court of Maricopa County and the Hon. Howard V. Peterson, a judge thereof; Arizona Public Service Company; Mid-Mountain Contractors, Inc.; and Susan J. Smith,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JEFFERSON L. LANKFORD
Jennings, Strouss & Salmon
111 West Monroe, Suite 1700
Phoenix, Arizona 85003
(602) 262-5972
Counsel for Petitioner

July 24, 1985

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Southwest Chemical Services, Inc.

Petitioner,

v.

The Superior Court of Maricopa County and the Hon. Howard V. Peterson, a judge thereof; Arizona Public Service Company; Mid-Mountain Contractors, Inc.; and Susan J. Smith,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioner Southwest Chemical Services, Inc.[1] respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona entered on May 1, 1985.

---

[1]The parent company of Petitioner is Aquatique, Inc., which acquired the Petitioner corporation from Morton Thiokol, Inc.

QUESTIONS PRESENTED

1 Does it violate due process to assert personal jurisdiction over a nonresident defendant which provided services to the nonresident manufacturer but did not participate in or influence the marketing and distribution of the manufacturer's product in the forum state?

2. Does due process require that the plaintiff prove the requisite jurisdictional facts when a defendant challenges personal jurisdiction by moving to dismiss, or may a plaintiff establish jurisdiction merely by the allegations of the complaint?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii.
TABLE OF CONTENTS	iii.
TABLE OF AUTHORITIES	iv.
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
I. THE DISAGREEMENT ON THE LIMITS OF PERSONAL JURISDICTION OVER "UP-STREAM" DEFENDANTS IN PRODUCTS CASES SHOULD BE RESOLVED BY THIS COURT	4
II. THE COURTS NEED A DEFINITE STATEMENT THAT DUE PROCESS REQUIRES THE PARTY ASSERTING JURISDICTION TO PROVE THE REQUISITE JURISDICTIONAL FACTS	i1
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, 710 F.2d 1449 (10th Cir. 1983)	12
Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984)	6
Calder v. Jones, _____ U.S._____, 104 S. Ct. 1482 (1984)	1
Clay v. Hopperton Nursery, Inc., 533 F. Supp. 476, 481 (E.D. Ky. 1982)	8
Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 651 F.2d 877 (3d Cir. 1981), *aff'd sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)	11
Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312 (D. Md. 1983)	8
Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975)	2
Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280 (9th Cir. 1977)	11, 12
DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981)	8
Ford Motor Co. v. Atwood Vacuum Machine Co., 392 So.2d 1305 (Fla. 1981)	6
Hedrick v. Daiko Shoji Co., Ltd., 715 F.2d 1355 (9th Cir. 1983)	8, 9
Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d 1266 (9th Cir. 1981)	8, 9
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	12
KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936)	12

TABLE OF AUTHORITIES Cont'd

Cases	Page
Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc., 445 U.S. 907 (1980) (White, J., dissenting from denial of certiorari)	5
Marine Midland Bank, NA v. Miller, 664 F.2d 899 (2d Cir. 1981)	12
McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936)	12
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963)	2
Midwest Elevator Systems, Inc. v. St. Paul Fire & Marine Ins. Co., 508 F. Supp. 578 (D. Kan. 1981)	8
Murphy v. Erwin-Wasey, Inc., 460 F.2d 661 (1st Cir. 1972)	12
Rockwell International Corp. v. Costruzioni Aeronautiche, 553 F. Supp. 328 (E. D. Pa. 1982)	6
Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1 (Goldberg, Circuit Justice), *appeal dismissed*, 382 U.S. 110 (1965)	1
Shaffer v. Heitner, 433 U.S. 186 (1977)	2
Shaw v. American Cyanamid Co., 534 F. Supp. 527 (D. Conn. 1982)	8
Talbot Tractor Co., Inc. v. Hinomoto Tractor Sales, USA, 703 F.2d 143 (5th Cir. 1983)	8
Tedford v. Grumman American Aviation Corp., 488 F. Supp. 144, 146 (N.D. Miss. 1980)	8
Weston v. City Counsel of Charleston, 2 Pet. 449 (1829)	2
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	*passim*

TABLE OF AUTHORITIES Cont'd

Constitutional and Statutory Provisions and Rules	Page
U.S. Const. amend. XIV, § 1	2
28 U.S.C. § 1257(3)	1
Rule 19.4, Rules of the Supreme Court of the United States	3
Fed. R. Civ. P., Rule 12(d)	12
Ariz. R. Civ. P., Rule 4	3
17A *Ariz. Rev. Stat. Ann.*, Rules of Procedure for Special Actions, Rule 1	1
Other Authorities	
L. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 *Sup. Ct. Rev.* 77 (1981)	9
Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 *U. Chi. L. Rev.* 156 (1982)	5
K. Ripple and M. Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 *Notre Dame Law*, 65, 80 (1980)	8
S. Jay, *"Minimum Contacts" As a Unified Theory of Jurisdiction: A Reappraisal*, 59 *N.C. L. Rev.* 429 (1981)	8

JURISDICTIONAL STATEMENT

Opinions Below

Neither of the courts below, the Supreme Court of Arizona and the Superior Court of Maricopa County, Arizona, issued any opinions.

Judgment

The judgment which is the subject of this petition is the order of the Arizona Supreme Court entered May 1, 1985. (Appendix p. 3).

Jurisdictional Statute

This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

Finality of the Judgment

The Arizona Supreme Court declined to accept jurisdiction of two petitions for "special action" filed by Petitioner Southwest Chemical Services, Inc. (hereafter "Southwest").[2] Southwest's petitions challenged the trial court's denial of Southwest's motions to dismiss for lack of personal jurisdiction in two separate but related cases.

The Arizona Supreme Court's order is a final judgment within the meaning of 28 U.S.C. § 1257. Although the order did not dispose of the entire case, it finally decided a federal issue which would be dispositive if decided in favor of Petitioner Southwest.

This Court has previously held that a state court denial of a due process challenge to personal jurisdiction is a reviewable final judgment. *Calder v. Jones*, _____ U.S. _____, 104 S. Ct. 1482, 1486 n.8 (1984); *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1 (Goldberg, Circuit Jus-

---

[2]Arizona's special action procedure is equivalent to extraordinary writ proceedings. 17A *Ariz. Rev. Stat. Ann.*, Rules of Procedures for Special Actions, Rule 1.

ice), *appeal dismissed*, 382 U.S. 110 (1965).[3] This Court long ago recognized its power to review a state's denial of an extraordinary writ application. *Weston v. City Counsel of Charleston*, 2 Pet. 449 (1829).

Review of the Arizona Supreme Court's order as a final one is required by practicality and the purpose of the jurisdictional statute, as this Court explained in reviewing a state court decision on a venue question involving a federal statute:

> [W]e believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963). *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

Similarly, Petitioner will be subjected to massive and potentially needless litigation if its federal due process rights are violated by requiring it to litigate in Arizona. Thus, review by this Court is not only authorized but is critically needed to prevent a constitutional violation and a shocking waste of legal and financial resources.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make

---

[3]This Court also has assumed jurisdiction in analogous circumstances without discussing finality. *E.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Indeed, *World-Wide* is procedurally identical to this case: the Oklahoma Supreme Court denied an application for a writ of prohibition to correct the trial court's denial of a motion to dismiss.

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Southwest's petition for certiorari involves two related cases posing identical questions. *See* Supreme Court Rule 19.4.

The first case is perhaps one of the most massive lawsuits in Arizona. Arizona Public Service Company (APS), a public utility, filed a complaint in 1982 seeking $50 million in damages. APS claims that its polyethylene natural gas pipeline failed, and it blames the failure on several parties: The Swanson Company, manufacturer and seller of the pipe; Sinclair-Koppers Company (Sinclair) and related corporate entities, the manufacturer and seller of the resin used by Swanson to produce the pipe; and Petitioner Southwest, which "compounded" Sinclair's resin base by mixing it with other chemicals.

The trial court denied Southwest's motion to dismiss for lack of *in personam* jurisdiction. Southwest contended that both federal due process and Arizona's long-arm rule, Rule 4, Ariz. R. Civ. P., precluded jurisdiction.

The second case is an action filed by Susan Smith in 1981 for severe personal injuries caused by an explosion of gas in the polyethylene pipeline. She seeks $50 million in actual damages and $50 million in punitive damages. Petitioner Southwest's motion to dismiss was based on the same grounds as in the first case, and it too was denied.

Southwest contended both that plaintiffs lacked evidence of minimum contacts and that the evidence affirmatively demonstrated the absence of minimum contacts with Arizona. Southwest neither conducts business nor owns property in Arizona. It had no contact with any of the Arizona residents — APS, Swanson and Smith.

Petitioner Southwest performed its compounding services in Texas under contract with the resin manufacturer's Texas plant. The manufacturer, Sinclair, sold the compounded resin product to an Arizona buyer, Swanson. The product was Sinclair's and was labelled as such. Sinclair alone controlled its marketing and distribution. Although the resin was located at Southwest's Texas plant before it was shipped, Petitioner had no role in its transport: Sinclair made the arrangements for most shipments with a common carrier; on a few occasions, the Arizona customer (Swanson) came to Texas to get the product. Some of Sinclair's documents indicate that Swanson was its customer, but none show that Swanson is an Arizona company. There is no evidence that Petitioner Southwest was aware that Arizona was the ultimate destination of the resin.

There also is no evidence that the failure of the pipe was due to defects in the manufacture of the resin. On the contrary, two investigative reports — one by APS and the other by the Arizona Corporation Commission, a state governmental body — point to improper installation of the pipe by Mid-Mountain Contractors, Inc. In the Smith case, APS and Mid-Mountain entered into agreements with Smith under which she has received $4.5 million and has been guaranteed a total minimum recovery of $7.5 million.

REASONS FOR GRANTING THE PETITION

I. THE DISAGREEMENT ON THE LIMITS OF PERSONAL JURISDICTION OVER "UPSTREAM" DEFENDANTS IN PRODUCTS CASES SHOULD BE RESOLVED BY THIS COURT.

This Court has addressed the due process limits on personal jurisdiction in a products case. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The facts of that case, however, were limited to an automobile retailer and a wholesale distributor — entities which are "down-

stream" from the manufacturer in the flow of products to the consumer.

This petition presents a different situation. Petitioner Southwest is "upstream" from the manufacturer in the chain of commerce. Southwest performed a service on Sinclair's resin product. Sinclair in turn supplied the resin as raw material for the manfacture of the pipe by Swanson. Swanson then sold the pipe to APS. Southwest did not participate in the sale or distribution of either the resin or the pipe.

Southwest's position in the stream of commerce is shared by many other commercial entities such as suppliers of raw materials and component manufacturers. They are upstream from the product manufacturer and thus are more remote from the plaintiff than any other party in the commercial chain.

The important role of upstream businesses in the nation's commerce in manufactured goods is undeniable. Their business requires certainty regarding their susceptibility to suit in a foreign forum. *See Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 445 U.S. 907 (1980) (White, J., joined by Powell, J., dissenting from denial of petition for certiorari); Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 *U. Chi. L. Rev.* 156 (1982). Justice White's observations in *Lakeside Bridge*, 445 U.S. at 910-11, are perhaps even more applicable to the instant case:

> The question at issue is one of considerable importance to contractual dealings. . . . The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this court offer no clear guidance on the question.

Yet deep division among the lower courts makes the rules quite uncertain. State and federal courts do not agree on whether jurisdiction can be asserted over upstream defendants or even on the criteria for deciding that question.

Although Petitioner contends that the rules set forth in *World-Wide* apply with at least equal force to upstream as well as downstream defendants, many courts view that opinion as confined to the downstream defendants involved in that case. They refuse to apply *World-Wide*'s limitations to upstream defendants, leading them to extend jurisdiction even more freely than is possible with the manufacturers, distributors and retailers which have more direct contacts with the plaintiff and the forum. *See, e.g., Rockwell International Corp. v. Costruzioni Aeronautiche,* 553 F. Supp. 328 (E.D. Pa. 1982) (distinguishing *World-Wide* as a retailer case and asserting jurisdiction over a foreign manufacturer of helicopter parts).

Another case relying upon this "distinction" to extend jurisdiction over a non-resident component manufacturer is *Bean Dredging Corp. v. Dredge Technology Corp.,* 744 F.2d 1081 (5th Cir. 1984). That court decided that "the mere fact of being a component-part manufacturer affords [defendant] no solace." 744 F.2d at 1085. Despite the lack of any direct contacts with the forum state and the lack of defendant's control or participation in the distribution of the product, the court upheld jurisdiction. In short, *Bean Dredging* proposes that an upstream defendant is subject to jurisdiction anywhere the primary manufacturer's product is sold, regardless of the limited and indirect nature of the defendant's involvement with the forum.

State courts are also reading *World-Wide* narrowly. For example, *Ford Motor Co. v. Atwood Vacuum Machine Co.,* 392 So. 2d 1305 (Fla. 1981), upheld jurisdiction over a non-resident component manufacturer. After boldly holding that *World-Wide* was inapplicable, 392 So.2d at 1311, the court directly contradicted the general principles stated in *World-Wide:*

> [T]he fact that a nonresident manufactures a component part outside the state and takes no part in the sale, distribution, or marketing of the finished product

in the state is no basis for a limitation on jurisdiction. 392 So. 2d at 1313.

Like the dissenters in that case, *see* 392 So. 2d at 1313 (Sundberg, C.J., dissenting), Petitioner believes that *World-Wide* sets forth principles of more general application. Decisions such as *Ford Motor* mean that upstream defendants are "subject to litigation anywhere in the states" regardless of their remoteness from the forum. 392 So. 2d at 1314. Such unlimited vulnerability to suits in distant forums contradicts the basic due process notion that jurisdiction is limited and clearly conflicts with *World-Wide's* explication of those limits. If anything, jurisdiction should be more limited over upstream defendants, whose contacts with the forum and the plaintiff are more remote than those downstream in the flow of commerce.

Most courts find *World-Wide* applicable to all defendants in products cases. However, even these courts disagree regarding its jurisdictional requirements. Roughly half of the cases correctly conclude that due process, as explained in *World-Wide,* creates significant limits on jurisdiction which require:

— more than the "foreseeability . . . that a product will find its way into the forum State," 444 U.S. at 297;

— that "potential defendants [must have the ability] to structure their primary conduct" to avoid suits in a foreign forum, *id.;*

— that defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," *id.;*

— that such purposeful activity is "not simply an isolated occurrence," but constitutes intentional "efforts . . . to serve, directly or indirectly, the market for [defendant's] product in other States," *id.;*

— that the conduct of another party, such as the primary manufacturer, "cannot satisfy the requirement of con-

> tact [by the defendant] with the forum States." 444 U.S. at 298.

E.g., Talbot Tractor Co., Inc. v. Hinomoto Tractor Sales, USA, 703 F.2d 143 (5th Cir. 1983); *Insurance Co. of North America v. Marina Salina Cruz,* 649 F.2d 1266 (9th Cir. 1981); *DeJames v. Magnificence Carriers, Inc.,* 654 F.2d 280 (3d Cir.) *cert. denied,* 454 U.S. 1085 (1981); *Midwest Elevator Systems, Inc. v. St. Paul Fire & Marine Ins. Co.,* 508 F. Supp. 578 (D. Kan. 1981); *Shaw v. American Cyanamid Co.,* 534 F. Supp. 527 (D. Conn. 1982). *See also* S. Jay, *"Minimum Contacts" As a Unified Theory of Jurisdiction: A Reappraisal,* 59 *N.C. L. Rev.* 429, 444 (1981); K. Ripple and M. Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead,* 56 *Notre Dame Law.* 65, 80 (1980).

Many courts, however, have ignored or misinterpreted the fact that *World-Wide* "repeatedly emphasizes," 56 *Notre Dame Law.* at 80, the purposefulness of the defendant's conduct. These cases adopt a foreseeability or knowledge test even though that standard was emphatically rejected in *World-Wide.* 444 U.S. at 296-97. *E.g., Hedrick v. Daiko Shoji Co., Ltd.,* 715 F.2d 1355, 1358 (9th Cir. 1983) (defendant is subject to jurisdiction if it "knew or should have known that a product would enter the stream of commerce"); *Clay v. Hopperton Nursery, Inc.,* 533 F. Supp. 476, 481 (E.D. Ky. 1982) (even though buyer solicited seller, seller was subject to jurisdiction either because it sold the product to buyer residing in forum state or because its product caused an effect in forum; complaining that Supreme Court has 'oscillated between the conflicting goals of protecting the interests of the plaintiff and the forum state, and insuring fairness to the nonresident defendant"); *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.,* 576 F. Supp. 312, 317-18 (D. Md. 1983) (sales to U.S. distributor-subsidiary by alien manufacturer; noting that courts are divided on whether due process permits jurisdiction over alien manufacturer); *Tedford v. Grumman American Aviation*

Corp., 488 F. Supp. 144, 146 (N.D. Miss. 1980) (airplane engine remanufacturer was subject to jurisdiction because it knew that airplane with engine as component "would be purchased and used by someone engaged in agricultural pursuits").

The uncertainty concerning *World-Wide* thus has led to conflict among the lower federal courts and even to apparent intracircuit conflict. *Compare INA v. Marina Salina Cruz, supra, with Hedrick v. Daiko Shoji, supra.*

Without this Court's guidance, the problem will worsen. The States have a natural inclination to read *World-Wide* narrowly, for "The State's incentive is always to expand jurisdiction to the detriment of out-of-state enterprises and the out-of-state consumers to whom the costs [of litigation and liability] are passed." L. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 *Sup. Ct. Rev.* 77, 95 (1981).

World-Wide has not resolved the issue of jurisdiction over nonresident defendants who, though in the chain of commerce in a product which comes to rest in the forum, lack direct contacts with the forum. The courts are divided on whether *World-Wide's* limitations apply to "upstream" defendants such as petitioner Southwest. Even those which agree that *World-Wide* applies cannot agree on what it requires. Yet the issue frequently recurs, for jurisdictional questions in products cases have multiplied in proportion to the growth in interstate commerce in manufactured products.

The instant case is an excellent vehicle for resolving the uncertainty on this important constitutional issue. Like *World-Wide,* this is a case of clear and well-developed facts. As in *World-Wide,* the Petitioner's relationship with the forum is fortuitous rather than deliberate and arises indirectly from the unilateral conduct of another party — here, the manufacturer of the raw materials, Sinclair. The respondents' argument below rested on three clearly inadequate theories: first, the factually unsupported assertion that

Petitioner shipped the product to Arizona; second, the theory (rejected in *World-Wide*) that Petitioner could have foreseen that Arizona was the product's ultimate destination; third, the claim (also rejected in *World-Wide*) that Petitioner's "contact" with Arizona was that the product ultimately came to rest and caused harm in Arizona.

Because all of the essential principles of *World-Wide* are involved in this case, granting the Petition will allow the Court to reiterate and extend them to upstream defendants:

— Petitioner's alleged awareness that the resin product would be sold by the resin manufacturer in interstate commerce, even if true, is mere "foreseeability" and relies on the "unilateral activity" of another party to confer jurisdiction;

— Because another entity (Sinclair) exclusively controlled and participated in the marketing and distribution of the product, Petitioner lacks "purposeful" conduct and the ability to "structure [its] primary conduct" needed to assert jurisdiction over it;

— Petitioner's contract, entered into and performed exclusively in Texas, was "far too attenuated a contact" with Arizona to constitute purposeful availment of the benefits of the forum State's laws;

— The interest of the State of Texas, where Petitioner and the resin manufacturer do business and where all of Petitioner's work was performed, cannot be subjugated by Arizona's assertion of jurisdiction over a party which does no business in Arizona.

A decision on the merits in favor of Petitioner would by no means forbid jurisdiction over all upstream defendants. Rather, it would simply dispose of the notion that there are no constitutional limits on jurisdiction and redefine those limits.

II. THE COURTS NEED A DEFINITE STATEMENT THAT DUE PROCESS REQUIRES THE PARTY ASSERTING JURISDICTION TO PROVE THE REQUISITE JURISDICTIONAL FACTS.

The burden of proof issue was crucial in both the Smith and APS cases, but it was particularly highlighted in the Smith case. The parties opposing Southwest's dismissal from the Smith case generally relied upon the allegations of the complaint as "establishing" jurisdiction. The only evidence presented to support jurisdiction was two Sinclair documents reflecting that its finished resin product would be sold to the Swanson Company. Although Swanson is an Arizona corporation, Sinclair's documents do not reflect that fact.

Southwest's argument that plaintiffs had the burden of proving the requisite jurisdictional facts, and yet had failed to discharge that burden, went unheeded by the Arizona courts. Neither the trial nor appellate courts provided any explanation for denying relief to Southwest.

The state and lower federal courts diverge on the burden of proof issue. This split is attributable to the lack of a definitive statement by this Court that jurisdiction depends on the facts and not mere allegations, and that the burden of proving those facts is the plaintiff's when jurisdiction is challenged by a motion to dismiss.

Although this Court has not decided the question, most courts concur with Petitioner's view. *E.g., Compagnie des Bauxites de Guinee v. Insurance Co. of North America,* 651 F.2d 877 (3d Cir. 1981), *aff'd sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982). There is also a developing consensus that to survive dismissal, the plaintiff must prove jurisdictional facts only by "prima facie" evidence; plaintiff confronts the "preponderance of evidence" standard only at trial or in a preliminary hearing. *E.g., Data Disc, Inc. v. Systems Technology Associates, Inc.,* 557 F.2d 1280 (9th Cir. 1977);

Marine Midland Bank, NA v. Miller, 664 F.2d 899 (2d Cir. 1981). *See* Rule 12(d), Fed. R. Civ. P. (preliminary hearing).

Some courts place the burden of proof on the moving defendant, however. They hold that the allegations of plaintiff's complaint must be taken as true unless rebutted by the movant's evidence. *E.g., Murphy v. Erwin-Wasey, Inc.,* 460 F.2d 661 (1st Cir. 1972); *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij,* 710 F.2d 1449 (10th Cir. 1983). These courts are clearly wrong. "It is clear that the party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists." *Data Disc,* 557 F.2d at 1285.

Moreover, this Court has held that a plaintiff bears the burden of proving jurisdictional facts when a defendant challenges subject matter jurisdiction. A motion to dismiss based on the lack of a minimum amount in controversy requires the plaintiff to present facts supporting jurisidiction. *KVOS, Inc. v. Associated Press,* 299 U.S. 269 (1936); *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1936).

Requiring a defendant to litigate on no more than unsupported allegations of jurisdiction is patently unfair. Moreover, the specific due process limits on jurisdiction, such as the "minimum contacts" test, presume a factual showing by plaintiff. This Court has already intimated that facts sufficient for personal jurisdiction must be demonstrated by the plaintiff. *See Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee,* 102 S. Ct. at 2105 and n.10.

The need for a definitive ruling is pressing because the burden of proof is a threshold issue in every motion to dismiss for lack of jurisdiction. In this case, Petitioner Southwest has been forced to participate in two enormously costly and complex lawsuits on little more than bare assertions that it is subject to Arizona jurisdiction.

This Court's review is needed to resolve both of the issues presented by this petition. First, the constitutional limits on jurisdiction over upstream defendants should be defined.

Second, the plaintiff's burden of proving the requisite jurisdictional facts should be stated definitively.

Petitioner Southwest Chemical Services, Inc., therefore respectfully requests that this Court grant the petition and issue a writ of certiorari to the Supreme Court of Arizona.

JENNINGS, STROUSS &
SALMON

By _____

Jefferson L. Lankford
111 West Monroe
Phoenix, Arizona 85003
(602)-262-5972
Counsel for Petitioner

APPENDIX

TABLE OF CONTENTS

Document	Page
Order denying motion to dismiss, *Smith v. APS*.....	1
Order denying motion to dismiss, *APS v. Atlantic Richfield*.....	2
Order declining jurisdiction over special action petition.....	3
Affidavit of Charles P. Lewis	4

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

Vivian Kringle, Clerk

2-7-85	Hon. Howard V. Peterson	R. Coffman
Date	Judge or Commissioner	Deputy

NO. C 445685

Susan J. Smith

vs.

Arizona Public Service

Company

This matter having been under advisement,

IT IS ORDERED denying the Motion to Dismiss For Lack of Jurisdiction Over The Party of Southwest Chemical Services.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

Vivian Kringle, Clerk

1/7/85	Hon. Howard V. Peterson	R. Coffman
Date	Judge or Commissioner	Deputy

NO. C 463933
C 479446 Consolidated

ARIZONA PUBLIC SERVICE COMPANY

vs

ATLANTIC RICHFIELD COMPANY,

et al

This matter having been under advisement,

IT IS ORDERED denying the Motion to Dismiss For Lack of Jurisdiction Over The Person of Defendant Southwest Chemical Services, Inc.

Supreme Court
STATE OF ARIZONA

May 1, 1985

RE: SOUTHWEST CHEMICAL SERVICES, INC. vs.
MARICOPA COUNTY SUPERIOR COURT et al
Supreme Court No. 17966-SA
Maricopa County No. C-463933

and

SOUTHWEST CHEMICAL SERVICES, INC. vs.
MARICOPA COUNTY SUPERIOR COURT et al
Supreme Court No. 18030-SA
Maricopa County No. C-445685

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 30, 1985, in regard to the above-referenced cause:

"ORDERED: The Court declines to accept jurisdiction of the Petitions for Special Action."

S. Alan Cook, Clerk

**IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation, Plaintiff, vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation; SINCLAIR-KOPPERS COMPANY, a partnership; ARCO POLYMERS, INC., a Pennsylvania corporation; THE SWANSON COMPANY, MANUFACTURERS, an Arizona corporation, also known as THE SWANSON COMPANY; SOUTHWEST CHEMICAL SERVICES, INC., a foreign corporation formerly known as SOUTHWEST CHEMICAL & PLASTICS COMPANY; XYZ CORPORATIONS I-X; BLACK AND WHITE PARTNERSHIPS I-X; and DOES I-X, inclusive, Defendants.	NO. C-463933 AFFIDAVIT OF CHARLES P. LEWIS COUNTY OF HARRIS, State of Texas } ss.

CHARLES P. LEWIS, being first duly sworn, upon his oath, deposes and says:

1. That he is the Vice-President of Finance for the defendant, Southwest Chemical Services, Incorporated.

2. That this Affidavit is based upon his personal knowledge of the events set forth in the Second Amended

Complaint, as well as his review of certain business records maintained by Southwest Chemcial Services, Incorporated.

3. That on June 28, 1956, United States Automation, a Delaware Corporation, was formed. Subsequently, on May 19, 1960, the corporate name was changed to Southwest Chemical & Plastics Company, and on June 25, 1973, the corporate charter was amended to reflect the present corporate name of Southwest Chemical Services Incorporated.

4. That since its incorporation on June 28, 1956, Southwest Chemical Services Incorporated has remained a Delaware Corporation with its principal place of business in Houston, Texas.

5. That since May 19, 1960, Southwest Chemical Services, Incorporated has served as a compounder for the domestic olefin market, and from May 19, 1960 through the present date its principal business has consisted of custom compounding for major chemical and petroleum companies.

6. That Southwest Chemical Services, Incorporated custom compounding business is or has been carried on at its Deer Park, Seabrook and Crockett, Texas plants. In addition, the corporate headquarters is located in Houston, Texas.

7. That initially, Southwest Chemical Services Incorporated remained a small operation employing approximately 13 individuals. During the 1970's, approximately 60 to 70 people were employed by Southwest Chemical Services Incorporated in its custom compounding business, and today Southwest Chemical Services Incorporated employs 244 people.

8. That since June 28, 1956, Southwest Chemical Services, Incorporated has never been licensed or qualified to do business in the State of Arizona.

That since June 28, 1956, Southwest Chemical Services, Incorporated has had no subsidiary corporation or divisions either located or licensed to do business in Arizona. In addition, since June 28, 1956, Southwest Chemical Services In-

corporated has never had any bank accounts, records, or property located in the State of Arizona, and, until the present cause of action, has never been a party in any suit filed in and litigated in Arizona.

10. That since June 28, 1956, Southwest Chemical Services Incorporated has never had any officers, employees, distributors or agents that have either resided or been stationed in the State of Arizona while employed by Southwest Chemical Service Incorporated.

That since June 28, 1956, Southwest Chemical Services, Incorporated, to the best of my knowledge, has never received orders for or performed any custom compounding for customers having their principal place of business in the State of Arizona.

Further your affiant sayeth naught.

CHARLES P. LEWIS

Charles P. Lewis

SUBSCRIBED AND SWORN to before me this 18th day of October, 1984.

BEVERLY J. MERIN

NOTARY PUBLIC

My Commission Expires:

April 1, 1985

Supreme Court, U.S.
FILED
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-147 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

SOUTHWEST CHEMICAL SERVICES, INC.

Petitioner,

v.

THE SUPERIOR COURT OF MARICOPA COUNTY AND THE HON. HOWARD V. PETERSON, A JUDGE THEREOF; ARIZONA PUBLIC SERVICE COMPANY; MID-MOUNTAIN CONTRACTORS, INC.; AND SUSAN J. SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JOHN CARTER GEMMILL
Counsel of Record
Teilborg, Sanders & Parks, P.C.
101 North First Avenue, #2900
Phoenix, Arizona 85003
(602) 251-2700

Counsel for ARIZONA PUBLIC SERVICE COMPANY

BEST AVAILABLE COPY

24pp

JOE M. ROMLEY
Robbins & Green, P.A.
3300 North Central Avenue
Suite 1800
Phoenix, Arizona 85012
(602) 248-7999
Counsel for MID-MOUNTAIN CONTRACTORS, INC.

ROBERT G. BESHEARS
O'Connor, Cavanagh, Anderson Westover, Killingsworth & Beshears
One East Camelback
Phoenix, Arizona 85012
(602) 263-3877
Counsel for SUSAN J. SMITH

BEST AVAILABLE COPY

No. 85-147

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

SOUTHWEST CHEMICAL SERVICES, INC.

Petitioner,

v.

THE SUPERIOR COURT OF MARICOPA COUNTY AND THE HON. HOWARD V. PETERSON, A JUDGE THEREOF; ARIZONA PUBLIC SERVICE COMPANY; MID-MOUNTAIN CONTRACTORS, INC.; AND SUSAN J. SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Respondents Arizona Public Service Company, Mid-Mountain Contractors, Inc., and Susan J. Smith respectfully request that the Court decline to grant review of the Petition for a Writ of Certiorari to the Supreme Court of Arizona.[1]

---

[1]Arizona Public Service Company is a subsidiary of AZP Group, Inc., as are El Dorado Investment Company, Energy Development Company and Malapai Resources Company. APS Fuels Company, Inc., APS Finance Company N.V. and Bixco, Inc. are subsidiaries of Arizona Public Service Company. Mid-Mountain Contractors, Inc. is now known as Beatt Equipment Company. It has no parent companies, subsidiaries or affiliates.

QUESTIONS PRESENTED

1. Is a state supreme court's refusal to accept a discretionary writ a final judgment for purposes of 28 U.S.C. §1257?

2. Is due process satisfied when a forum court with an especial interest in adjudicating the claim asserts personal jurisdiction over a nonresident defendant that manufactures and places into the stream of commerce an allegedly unreasonably dangerous and defective product in such a manner that on numerous occasions large quantities of the product are shipped directly from the defendant to the forum state where the injury occurs?

3. Is due process met when a plaintiff goes beyond the mere allegations of the Complaint and provides the Court with numerous documents, affidavits and deposition excerpts, all of which support the propriety of asserting personal jurisdiction over a nonresident defendant?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. AS NO FINAL JUDGMENT UNDER 28 U.S.C. §1257 EXISTS IN THIS CASE, THIS COURT MAY NOT ASSERT ITS JURISDICTION BY ACCEPTING PETITIONER'S WRIT OF CERTIORARI	4
II. THE QUESTIONS PRESENTED BY THE PETITIONER ARE NOT SUPPORTED BY THE FACTS OF THIS CASE WHICH THE ARIZONA COURTS REVIEWED AND FOUND SUFFICIENT TO SUPPORT THE PROPER ASSERTION OF JURISDICTION OVER PETITIONER	6
III. ARIZONA LAW COMPORTS WITH DUE PROCESS REQUIREMENTS AND REQUIRES THE PLAINTIFF TO CARRY THE BURDEN OF ESTABLISHING THAT JURISDICTION IS PROPER; RESPONDENTS MET THAT BURDEN AND JURISDICTION OVER PETITIONER WAS PROPERLY ASSERTED	12
CONCLUSION	15
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases	Page
Buckeye Boiler Co. v. Superior Court, 71 Cal.2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969)	11
Burger King Corp. v. Rudzewicz, _____ U.S. _____, 105 S. Ct. 2174 (1985)	8,14
Calder v. Jones, 465 U.S. _____, 104 S. Ct. 1482 (1984)	5,8
Coast to Coast Marketing Co., Inc. v. G & S Metal Products Company, Inc., 130 Ariz. 506, 637 P.2d 308 (App. 1981)	12
Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280 (9th Cir. 1977)	13
De James v. Magnificence Carriers, Inc., 654 F.2d 280 (3rd Cir.), *cert. denied*, 454 U.S. 1085 (1981)	11
Department of Banking, State of Nebraska v. Pink, 317 U.S. 264, 63 S. Ct. 233, 87 L.Ed. 254, *rehearing denied* 318 U.S. 802, 63 S. Ct. 850, 87 L.Ed. 1166 (1942)	4
Gospel Army v. City of Los Angeles, 331 U.S. 643, 67 S. Ct. 1428, 91 L.Ed. 1662 (1947)	4
Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)	11
G.T. Helicopters, Inc. v. Helicopters, Ltd., 135 Ariz. 380, 661 P.2d 230 (App. 1983)	12,13
Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958)	12
Hedrick v. Daiko Shoji Co. Ltd. Osaka, 715 F.2d 1355 (9th Cir. 1983)	10
Hendrickson v. Reg O. Co., 657 F.2d 9 (3rd Cir. 1981)	11
Keeton v. Hustler Magazine, Inc., 465 U.S. _____, 104 S. Ct. 1473 (1984)	8,9

TABLE OF AUTHORITIES (Cont'd.)

Cases	Page
King v. Superior Court, 138 Ariz. 147, 673 P.2d 787 (1983)	4
Nelson By Carson v. Park Industries, Inc., 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1277 (1984)	11
Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 622 P.2d 469 (1981)	10
Poyner v. Erma Werke GMBH, 618 F.2d 1186 (6th Cir.), *cert. denied*, 444 U.S. 841 (1980)	11
World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978)	5
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L.Ed.2d 490 (1980)	5,7,8,10
Statutory Provisions and Rules	
28 U.S.C. §1257	4,5
4 *Ariz. Rev. Stat. Ann.* §12-681	6
Rule 19, Rules of the Supreme Court of the United States	3
17A *Ariz. Rev. Stat. Ann.*, Rules of Procedure for Special Actions, Rule 1	4

STATEMENT OF THE CASE

This Brief in Opposition is filed jointly by Arizona Public Service Company (hereinafter "APS"), Mid-Mountain Contractors, Inc. (hereinafter "Mid-Mountain") and Susan J. Smith, named Respondents. APS and Susan J. Smith are plaintiffs in two related cases in the courts below. Mid-Mountain is a defendant in the Smith case. APS is also a defendant in the Smith case.

An understanding of the facts surrounding the underlying actions is necessary because the Petitioner has framed the questions presented in its Petition for Certiorari using an incomplete and inaccurate factual statement. This case involves polyethylene pipe which was utilized for the underground transmission of natural gas. In the early 1970's, Arizona Public Service Company installed approximately 40,000 service lines of this particular polyethylene pipe, type PE 3306, which would transmit natural gas to its customers.

As a consequence of two tragic natural gas explosions, and subsequent comprehensive testing of the pipe, APS concluded that this PE 3306 pipe was defective. Because of the unreasonable danger created by the defective pipe, APS made a decision, in the interest of public safety, to replace the 40,000 services and eliminate the hazardous conditions created by the pipe and the resins from which it was made.

APS brought the initial underlying action against various defendants who manufactured and designed this PE 3306 pipe. These defendants include the Atlantic Richfield Company (hereinafter "ARCO"), who designed and manufactured the resin, Super Dylan 7000 Orange, from which the pipe was made. Technically, the resin was designed and manufactured by ARCO's predecessors in interest, primarily Sinclair Koppers Company. The polyethylene resin used in Super Dylan 7000 Orange was produced at Sinclair Koppers' Port Arthur, Texas plant in the form of natural colored pellets. Sinclair Koppers then sent the pellets to Petitioner, Southwest Chemical Services, Inc. (hereinafter "Southwest Chemical"), also in Texas. Southwest Chemical then added

an orange cadmium pigment (Harshaw 1513), an ultraviolet stabilizer (UV-531), and an antioxident (Santonox) to the resin. These colorants and additives were usually blended in a master batch. Southwest Chemical furnished the masterbatch which was added to the base resin supplied by Sinclair Koppers. Southwest Chemical also blended or compounded the base resin or feedstock with the masterbatch. This mixing or compounding process also includes recutting the resin into pellets.

Much of the manufacturing performed by Southwest Chemical was pursuant to instruction from Sinclair Koppers. Sinclair Koppers also regulated much of the quality control of the resins compounded by Southwest Chemical. However, Southwest Chemical also performed quality control testing at its own facility.

One decision which was made solely by Southwest Chemical was the type of compounding process which Southwest Chemical would use. There are two different processes. One is the Banbury compounding process, and the other is the extruder compounding process. Mr. Love, of Southwest Chemical, has testified that the Banbury compounding process gave better dispersion of the materials. However, the compounding costs are higher when the Banbury process is used. Even though the Banbury process gives a better dispersion of materials, only two of the ten lots of resin which were received in Arizona from Southwest Chemical were compounded on the Banbury machine. According to testimony from Mr. Love, the choice regarding which process to use was that of Southwest Chemical alone.

The resin, Super Dylan 7000 Orange, was then shipped from Southwest Chemical to The Swanson Company (hereinafter "Swanson") in Arizona. Swanson is another defendant in the underlying actions. On occasion, Swanson would pick up the resin from Southwest Chemical in Texas. Southwest Chemical shipped approximately ten lots of resin to Swanson in the early 1970's which accounted for over 500,000 pounds of resin. Swanson then extruded the resin

into over 2,000,000 feet of PE 3306 pipe which was then purchased by APS. Respondent Mid-Mountain installed some of the pipe for APS.

APS brought its lawsuit to recover damages for property damage to its pipe, its gas distribution system, and to its supply of gas; for the cost of the repair and replacement of the 40,000 service lines; for the cost of increased leak surveys and extensive testing; and for monies paid to third parties, including Susan J. Smith, for direct property damage, personal injury and death caused by the defective pipe and resins. Respondent Susan J. Smith, instituted a second action to recover for injuries sustained in an explosion allegedly caused by the defects in the pipe and the resins from which it was made.

The above-stated facts were presented to the trial court in opposition to Southwest Chemical's Motions to Dismiss for Lack of Personal Jurisdiction. The facts were supported by excerpts of deposition transcripts, affidavits from experts, and documentation produced by the various parties and subpoenaed from Southwest Chemical prior to its being named in the lawsuit. [2]

The trial court denied Southwest Chemical's Motions. The Arizona Supreme Court then declined to accept jurisdiction of Southwest Chemical's Petitions for Special Action on that issue.

---

[2] The Clerk of the Maricopa County Superior Court has been requested to certify and transmit the referenced documents pursuant to Rule 19, Rules of the United States Supreme Court.

REASONS FOR DENYING THE PETITION

I. AS NO FINAL JUDGMENT UNDER 28 U.S.C. §1257 EXISTS IN THIS CASE, THIS COURT MAY NOT ASSERT ITS JURISDICTION BY ACCEPTING PETITIONER'S WRIT OF CERTIORARI.

Jurisdiction does not properly lie with this Court. The judgment which is the subject of the Petition for Certiorari is an Order of the Arizona Supreme Court entered May 1, 1985. (See Appendix to Petition for Certiorari). Pursuant to 28 U.S.C. §1257 this Court may only review final judgments or decrees rendered by the highest court of a state in which a decision could be had.

The test of "finality" required by 28 U.S.C. §1257 is whether the record shows that the order of the appellate court has in fact fully adjudicated rights, and that the adjudication is not subject to review further by a state court. *Department of Banking, State of Nebraska v. Pink,* 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254, *rehearing denied* 318 U.S. 802, 63 S. Ct. 850, 87 L. Ed. 1166 (1942). *See also, Gospel Army v. City of Los Angeles,* 331 U.S. 643, 67 S. Ct. 1428, 91 L. Ed. 1662 (1947).

The Arizona Supreme Court's Order is not a final judgment within the meaning of 28 U.S.C. §1257. The Petitioner requested the Arizona Supreme Court to accept jurisdiction of two Petitions for Special Action challenging the trial court's denial of Southwest Chemical's Motions to Dismiss for lack of personal jurisdiction. In Arizona, special actions are the vehicle for relief which was previously obtained by writs of certiorari, mandamus or prohibition. Special actions are not available where there is an equally plain, speedy, and adequate remedy by appeal. 17A *Ariz. Rev. Stat. Ann.,* Rules of Procedures for Special Actions, Rule 1.

The decision of an Arizona court to accept jurisdiction over a special action is highly discretionary. *King v. Superior Court,* 138 Ariz. 147, 673 P.2d 787 (1983). Most im-

portantly, a refusal by an Arizona appellate court to assert jurisdiction over a special action does not preclude the petitioning party from later raising the same legal issues on appeal. Indeed, the Arizona Supreme Court in this case did not render a final judgment on the merits, but simply declined to accept jurisdiction and review the issues presented. Petitioner still has available a remedy through appeal to the Arizona Supreme Court.

The procedural posture of this case is very different from that in the cases cited by Petitioner. In *Calder v. Jones*, 465 U.S. _____, 104 S.Ct. 1482 (1984) the Court held that a state court denial of a due process challenge to personal jurisdiction is a reviewable final judgment. In that case, however, the state appellate court had reviewed the personal jurisdiction question and made a final judgment on that issue. This Court pointed out that the judgment of the appellate court was not subject to further review by the state courts.

Petitioner also likens the procedural posture of the case at bench to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), where the trial court denied petitioners motion to dismiss for lack of *in personam* jurisdiction. The Oklahoma Supreme Court denied petitioner's writ of prohibition only after considering the issue on the merits and handing down an opinion detailing its analysis and conclusions. *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351 (Okla. 1978). There, the highest court of the state had rendered a final judgment which was not subject to further review in that state court.

In the case at bench the Arizona Supreme Court declined to review the issue at this time. Petitioner is not left without a remedy in state court. Avenues are still available to Petitioner through the regular course of appeal. Therefore, the Arizona Supreme Court judgment is not "final" as required by 28 U.S.C. §1257 and the Petition for Certiorari should be denied.

II. THE QUESTIONS PRESENTED BY THE PETITIONER ARE NOT SUPPORTED BY THE FACTS OF THIS CASE WHICH THE ARIZONA COURTS REVIEWED AND FOUND SUFFICIENT TO SUPPORT THE PROPER ASSERTION OF JURISDICTION OVER PETITIONER.

A.

Petitioner initially asks this Court to address the question whether due process is violated when personal jurisdiction is asserted over a nonresident defendant which provided services to the nonresident manufacturer, but did not participate in or influence the marketing or distribution of the manufacturer's product in the forum state. That question, while perhaps worthy of discussion in another setting, does not address the factual situation presented by this case.

First, Southwest Chemical, for essentially the first time on appeal, claims they merely provided a service, rather than a product. This contention completely ignores Arizona's product liability statute, under which Southwest Chemical is clearly a manufacturer. 4 *Ariz. Rev. Stat. Ann.* §12-681 defines a manufacturer as:

> [A] person or entity who designs, *assembles, fabricates,* produces, constructs or *otherwise prepares* a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or in significant part by the manufacturer or a seller owning the manufacturer in whole or significant part. (Emphasis added).

Southwest Chemical's involvement in the total manufacture of Super Dylan 7000 Orange included adding various ingredients to the raw pellets, mixing the new ingredients, or masterbatch, with the feedstock of clear resin pellets in a heat process and recutting the pellets. They then would package or bag the pellets. Thus Southwest Chemical "assembled" and "fabricated" the product and is considered a manufacturer of a product under Arizona law. It is irrele-

vant at this point that the product was labeled as that of Sinclair Koppers (ARCO). To classify themselves as merely a provider of services is an inaccurate characterization.

Additionally, as indicated in the Statement of the Case, Southwest Chemical did provide independent input in the manufacture of the product. The decision as to which type of compounding process to use, the Banbury type process or the extrusion type process, was a decision made by Southwest Chemical alone. In response to Petitioner's Motions to Dismiss for lack of jurisdiction, Respondents provided an affidavit to the Court by an expert in the field of polymers, stating that improper compounding could contribute ultimately to defects in pipe made from the resin compound and that improper and inconsistent dispersion could cause the pipe to be defective.

Next, the facts do not substantiate Petitioner's assertion that it did not participate in or influence the marketing or distribution of the product in the forum state. By their own admission, Southwest Chemical does business with all the major chemical and petroleum companies. Southwest Chemical cannot logically expect that the products in whose manufacture it participates will remain solely in the state of Texas. A number of the requisition forms provided to Southwest Chemical by Sinclair Koppers indicate that the resin is to be shipped to The Swanson Company or will be picked up by The Swanson Company.

In fact, ten lots of the resin were sent directly from Southwest Chemical Services to Swanson in Arizona. This occurred over a four year period and involved several hundred thousand pounds of resin.

This Court's most recent pronouncement on personal jurisdiction in product liability cases is instructive. In *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 297-98, 100 S. Ct. at 567, this Court held:

> [I]f the sale of a product of a manufacturer or distributor ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer or dis-

> tributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. [3]

In this instance, the defective product was placed in the stream of commerce at Southwest Chemical, destined directly for the forum state of Arizona. This was not an isolated instance, nor a fortuitious circumstance, but the product was made for Swanson in Arizona and was sent directly there.

Furthermore, in its rendition of the facts Petitioner fails to mention any facts in support of the forum state's interest. In its cry that due process has been violated, Petitioner omits any reference to this Court's recent pronouncements in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. _____, 104 S. Ct. 1473 (1984) and *Calder v. Jones, supra,* which indicate that the state's interest is part of the due process equation. Respondents cited these cases to the Arizona courts, but Petitioner neither distinguished nor refuted them. Petitioner has not attempted to distinguish or refute the application of these cases because the forum state of Arizona has an especial interest in exercising jurisdiction in this case. The plaintiff in the initial underlying action, APS, is a state-regulated utility. The plaintiff in the second action, Susan J. Smith, was an Arizona resident at the time of her accident.

---

[3] This Court most recently addressed the issue of *in personam* jurisdiction in *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985). That case essentially followed the *World-Wide Volkswagen* analysis. *Burger King* involved a franchise agreement rather than the interstate transportation of goods. The facts of *World-Wide Volkswagen* are much more analogous to the case at bench; thus Respondents frame their response to Petitioner's argument with reference to *World-Wide Volkswagen*.

One of the defendants is an Arizona corporation. The events from which this lawsuit arose all occurred in Arizona. Approximately 40,000 service lines of gas pipe were installed in Arizona and were later removed and replaced after it was determined the defects in the pipe made it too dangerous to transport natural gas to Arizona residents. Explosions occurred in Arizona which killed and maimed Arizona residents and damaged property in Arizona. Accordingly, this case has affected or may affect a large number of Arizona citizens.

Other than the fact that Southwest Chemical is a Texas corporation, the Texas Court has absolutely no interest in this case. As reiterated in *Keeton v. Hustler Magazine, Inc.*, *supra*, 465 U.S. at _____, 104 S. Ct. at 1479:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.

Clearly, Arizona has a strong interest in adjudicating this claim as well as an interest in preventing piecemeal litigation and possibly conflicting adjudications as may occur if Respondents were required to litigate their case against Southwest Chemical in Texas.

B.

Petitioner's second framing of the due process argument is equally without merit. Petitioner argues that this Court has never entertained the question whether a state may assert jurisdiction over a nonresident "upstream" manufacturer. However, under any interpretation, the *World-Wide Volkswagen* analysis supports the Arizona Court's assertion of personal jurisdiction over Southwest Chemical. In *World-Wide Volkswagen*, there was no showing that any automobile sold by World-Wide, the regional distributor, or Seaway, the retail dealer, had ever entered the forum State of Okla-

homa with the single exception of the vehicle involved in that case. 444 U.S. at 289. In the instant case it is uncontested that ten different shipments of the resin which Southwest Chemical compounded were sent directly to Swanson in Arizona. The shipments took place over an approximately four year period and accounted for hundreds of thousands of pounds of resin.

While the merits of Petitioner's argument will be more fully briefed only if this Court accepts jurisdiction, it should be noted that Southwest Chemical is essentially claiming the limits of jurisdiction for "upstream" defendants, as they characterize themselves, should be more narrowly drawn than for "downstream" defendants. This reasoning is neither persuasive nor logical. In *World-Wide Volkswagen*, only the retail dealer and the regional distributor appealed the state court's assertion of personal jurisdiction. The manufacturer and importer did not seek review of the state court's determination. Arguably, jurisdiction over those "upstream" defendants was properly asserted. A corporation which delivers its products into the stream of commerce with the expectation that the product will be purchased or used in the forum state should not find it unfair to defend suit in that state. *World-Wide Volkswagen v. Woodson, supra; Hedrick v. Daiko Shoji Co. Ltd. Osaka,* 715 F.2d 1355 (9th Cir. 1983); *Northern Propane Gas Co. v. Kipps,* 127 Ariz. 522, 622 P.2d 469 (1981).

In *World-Wide Volkswagen*, this Court recognized and distinguished among the various entities that may compose a distribution system of a product. The two defendants in that case who were not subject to Oklahoma jurisdiction were at the downstream end of the automobile distribution system. The scope of the foreseeable market served by those particular defendants and the benefits those defendants may have derived from the sale of the product was limited. In contrast, the foreseeable market is generally broader for manufacturers and primary distributors of products who are at the beginning of a distribution system. These entities serve,

directly or indirectly, and derive economic benefit from, a wider market. These manufacturers and distributors purposely conduct their activities to make their product available in as many forums as possible. Thus, a manufacturer or primary distributor may be subject to a certain forum's jurisdiction when a secondary distributor or retailer is not. This is so because the manufacturer and primary distributor have intended to serve a broader market and have derived benefits from serving that market. *Nelson By Carson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1277 (1984). *See Hendrickson v. Reg O. Co.*, 657 F.2d 9 (3rd Cir 1981); *De James v. Magnificence Carriers Inc.*, 654 F.2d 280 (3rd Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir.), *cert. denied*, 444 U.S. 841 (1980).

This rationale was succinctly set forth in *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961) where the Court stated:

> With the increasing specialization of commercial activity and the growing interdependence of business enterprises, it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from [their] laws is an indirect one, however, does not make [those laws] any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product to say that the use of such products in the ordinary course of commerce is sufficient contact with [such states] to justify a requirement that he defend [there].

See also Buckeye Boiler Co. v. Superior Court, 71 Cal.2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969). Simply because the benefit Southwest Chemical derived from the laws of the State of Arizona may be an indirect one does not make it any less essential to the conduct of Southwest Chemical's business. The use in Arizona of the product manufactured by Southwest Chemical surely generated gross income for Southwest Chemical. Thus, Southwest Chemical has "pur-

posely availed itself of the privilege of conducting activities" within Arizona, thus "invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-1240, 2 L. Ed.2d 1283 (1958). Southwest Chemical, as a manufacturer of a product bound for ports outside of Texas, in this instance Arizona, has purposefully directed its commercial efforts toward the residents of other states, including Arizona. Thus, under the facts of the case it is not unfair to require Southwest Chemical to defend itself in Arizona.

III. ARIZONA LAW COMPORTS WITH DUE PROCESS REQUIREMENTS AND REQUIRES THE PLAINTIFF TO CARRY THE BURDEN OF ESTABLISHING THAT JURISDICTION IS PROPER; RESPONDENTS MET THAT BURDEN AND JURISDICTION OVER PETITIONER WAS PROPERLY ASSERTED.

Petitioner asks this Court to determine if due process requires that the plaintiff prove the requisite jurisdictional facts when a defendant challenges personal jurisdiction by moving to dismiss, or may the plaintiff establish jurisdiction merely by the allegations of the complaint. That question is not supported by the facts of the case before the Court. As noted in the Statement of the Case and herein, Respondents did not rest on the allegations of their Complaints in responding to Petitioner's Motions to Dismiss, but provided in addition numerous documents, deposition transcript exerpts, and affidavits which supported the assertion of jurisdiction.

The Arizona Court utilized the Arizona standard which states that when a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff has the burden of establishing that such jurisdiction is proper. *G.T. Helicopters, Inc. v. Helicopters, Ltd.*, 135 Ariz. 380, 661 P.2d 230 (App. 1983); *Coast to Coast Marketing Co., Inc. v. G & S Metal Products Company, Inc.*, 130 Ariz. 506, 637 P.2d 308 (App. 1981). Respondents met that burden of proof. Res-

pondents supplied documents which indicated that Southwest Chemical participated in the manufacture of the product, the pipe resin for PE 3306 pipe; documents which indicated that the product was bound for The Swanson Company; documents which indicated that the product was shipped directly from Southwest Chemical to The Swanson Company in Arizona; documents which indicated that at least ten shipments were sent to Arizona over a four-year period and that these shipments totalled hundreds of thousands of pounds of resin. Respondents also provided an affidavit from an expert in the field of polymers which indicated, *inter alia*, the compounding process is an important step in the overall manufacturing process of a product such as Super Dylan 7000 Orange, and improper compounding can contribute ultimately to defects in pipe made from the resin compound. In addition, improper and inconsistent dispersion could cause the pipe to be defective. Already on file with the Court was another affidavit from the same polymers expert which stated the resin was dangerous and defective prior to the time it reached Swanson. Deposition transcript exerpts were also provided to the Arizona courts. These transcripts indicated Southwest Chemical's involvement in the manufacturing and distribution of the Super Dylan 7000 Orange resin.

Petitioner claims there is need for a statement from this Court that the party asserting jurisdiction must prove the requisite jurisdictional facts. Southwest Chemical contends the proper standard is that set forth in *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977) which places the burden of establishing that jurisdiction exists upon the party seeking to invoke jurisdiction. Respondents submit the standard Petitioner seeks is that articulated and employed by the Arizona Courts. "Once the defendant has moved for dismissal for lack of jurisdiction, the plaintiff has the burden of establishing that jurisdiction is proper." *G.T. Helicopters, Inc. v. Helicopters Ltd., supra*, 135 Ariz. at 382, 661 P.2d. at 232.

In any event, this Court recently set forth the burden of proof to be utilized in determining if jurisdiction is proper. Once minimum contacts have been established by the party asserting jurisdiction the burden shifts to the party seeking to avoid jurisdiction to prove that the imposition of jurisdiction is unfair. That is, "where a defendant who purposely has directed his activities at forum residents seeks to defeat jurisdiction he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2185 (1985). In that case this Court also stated:

> [C]ourts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." ... These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.

Id., 105 S.Ct. at 2184. (Citations omitted). An application of the above factors to the case at bench indicates that this is the type of case where a lesser showing of minimum contacts is required.

There is no need for an additional statement by this Court with respect to the burden of proof necessary when personal jurisdiction is challenged. Under both the Arizona standard and the *Burger King* standard, jurisdiction over Petitioner was properly asserted by the Arizona courts.

CONCLUSION

For the above reasons, Respondents Arizona Public Service Company, Mid-Mountain Contractors, Inc., and Susan J. Smith, respectfully request that this Court decline to exercise jurisdiction in this matter and refuse to issue a Writ of Certiorari to the Supreme Court of Arizona.

TEILBORG, SANDERS & PARKS, P.C.

By: _____

John Carter Gemmill
Counsel of Record
101 North First Avenue
Suite 2900
Phoenix, Arizona 85003
(602) 251-2700
Counsel for ARIZONA PUBLIC SERVICE COMPANY

ROBBINS & GREEN, P.A.

By: _____

Joe M. Romley
3300 North Central Avenue
Suite 1800
Phoenix, Arizona 85012
(602) 248-7999
Counsel for MID-MOUNTAIN CONTRACTORS, INC.

O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS

By: _____

Robert G. Beshears
One East Camelback
Phoenix, Arizona 85012
(602) 263-3877
Counsel for SUSAN J. SMITH

CERTIFICATE OF SERVICE

STATE OF ARIZONA
County of Maricopa
} ss.

JOHN CARTER GEMMILL, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Respondents in this cause; that on this __ day of August, 1985, he mailed three (3) copies of Respondent's Brief In Opposition to the Petition in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Jefferson L. Lankford
JENNINGS, STROUSS & SALMON
111 West Monroe, Suite 1700
Phoenix, Arizona 85003

and that he also mailed forty (40) copies of the Respondent's Brief In Opposition to the Petition to the Clerk of this Court, first-class postage prepaid; all in compliance with Rule 28, Rules of the Supreme Court.

_____
John Carter Gemmill

SUBSCRIBED AND SWORN to before me this __day of August, 1985.

_____
Notary Public

My Commission Expires:

_____

Supreme Court, U.S.
FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-147

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

Southwest Chemical Services, Inc.

Petitioner,

v.

The Superior Court of Maricopa County and the Hon. Howard V. Peterson, a judge thereof; Arizona Public Service Company; Mid-Mountain Contractors, Inc.; and Susan J. Smith,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JEFFERSON L. LANKFORD
Jennings, Strouss & Salmon
111 West Monroe, Suite 1700
Phoenix, Arizona 85003
(602) 262-5972
Counsel for Petitioner

August 27, 1985

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The Arizona Supreme Court's Order is a "Final Judgment."	1
II. Respondents' Arguments on the Merits Ignore the Reasons for This Court to Accept the Petition to Decide the Merits	2

TABLE OF AUTHORITIES

Cases	Page
Burger King Corp. v. Rudzewicz, _____ U.S. _____, 105 S. Ct. 2174 (1985)	5
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	2
Mercantile Nat. Bank v. Langdeau, 371 U.S. 555 (1963)	2
Michigan Cent. R. Co. v. Mix, 278 U.S. 492 (1929)	1
Shaffer v. Heitner, 433 U.S. 186 (1977)	2
Weston v. City Counsel of Charleston, 2 Pet. 449 (1829)	[illegible]
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	[illegible]
Statutes	
28 U.S.C. § 1257	1

I. THE ARIZONA SUPREME COURT'S ORDER IS A "FINAL JUDGMENT."

Despite abundant precedent to the contrary (See Petition at 1-2 and n. 3), Respondents contend that the order below is not a reviewable final judgment.

Respondents' position rests on three arguments. First, they observe that Arizona's "special action" or extraordinary writ relief is discretionary. (Brief in Opposition at 4-5). Yet this Court, per Chief Justice Marshall, long ago recognized the reviewability of a state court's denial of extraordinary writ relief. *Weston v. City Counsel of Charleston*, 2 Pet. 449 (1829). Although *Weston* is cited in the Petition (at p. 2), Respondents ignore it. Respondents also cite no authority that the discretionary nature of the state court's decision makes its judgment somehow non-final.

Second, respondents argue that the order below was not final because it was not accompanied by an opinion. (Brief in Opposition at 5). That is Respondents' sole distinction of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *World-Wide* was procedurally identical to this case: this Court assumed jurisdiction over the Oklahoma Supreme Court's denial of extraordinary writ relief after the trial court denied a motion to dismiss for lack of jurisdiction.

The absence of an opinion on the merits does not render an otherwise final judgment into a non-final one. This Court has already decided this point. In *Michigan Cent. R. Co. v. Mix*, 278 U.S. 492 (1929), the Missouri Supreme Court denied an extraordinary writ application without opinion. Justice Brandeis wrote for the Court that the denial of the application "is final within the meaning" of the predecessor statute to 28 U.S.C. § 1257. This holding is the only sensible one: this Court's review of an otherwise final judgment cannot be frustrated by a state court's refusal or failure to put its *ratio decidendi* into words. Nor does 28 U.S.C. § 1257 so limit this Court's power.

Respondents' third argument is that because a later appeal is possible, the present judgment is not final. This Court's

opinion in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), leaves no room for such an argument. *Cox* summarized the many cases in which this Court has held that the judgment was final even though further proceedings would occur in the state court. Moreover, the possibility of appeal existed in such cases as *World-Wide* and *Shaffer v. Heitner*, 433 U.S. 186 (1977); this Court nevertheless reviewed the judgments because they were final ones.

Judgments in such cases are final because immediate review is the only practical means of deciding the federal question involved. Prompt review prevents future litigation that is wholly wasted if the federal issue has been wrongly decided. *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Cox*, 420 U.S. at 482-83. That is an important factor in this massive and extremely costly case. If on the other hand this case proceeds and Petitioner prevails on the merits, Petitioner will not appeal and the federal issue will be mooted. Its constitutional rights will never be vindicated and the important questions of law will not be presented to this Court. *See Cox*, 420 U.S. at 482-83.

Moreover, the judgment below is a final decision in another sense. If decided favorably to Petitioner, the federal issue is dispositive. If Petitioner is correct, the case against it must be dismissed. That state law issues may remain for decision (if the federal question was correctly decided) should not obscure the controlling final nature of the judgment on the federal question.

II. RESPONDENTS' ARGUMENTS ON THE MERITS IGNORE THE REASONS FOR THIS COURT TO ACCEPT THE PETITION TO DECIDE THE MERITS.

The brief in opposition to certiorari argues the merits. It does not address the threshold question of whether this Court should decide the merits.

The powerful public policy and juridical reasons for granting the petition are undenied. Respondents do not contest that:

— The due process limits on jurisdiction over "upstream" defendants have never been explicitly defined. (Petition at 4-5, 9).

— The lower federal courts are deeply divided over those limits, and cannot even agree whether *World-Wide* has any precedential value in upstream cases. (*Id.* at 6-9).

— The problem of unlimited jurisdiction over upstream non-residents will only worsen, since the States tend to expand their own jurisdiction. (*Id.* at 9).

— Upstream businesses play a crucial role in the nation's commerce in manufactured goods, and their need for certainty to transact business strongly supports review. (*Id.* at 5).

— A conflict exists in the lower courts as to which party bears the burden of proving jurisdictional facts. (*Id.* at 11-12).

— The burden of proof issue is important because it is a threshold question presented by every motion to dismiss for lack of jurisdiction. (*Id.* at 12).

The reasons for granting review are thus essentially unchallenged. Respondents instead attempt to argue the merits, with two exceptions. The first exception is that Respondents say that burden of proof is not really an issue. They agree that they bore the burden of proof, deny having rested upon the allegations of their complaint, and argue that they sus-

tained their burden of proving jurisdiction with many exhibits. (Brief in Opposition at 12-13). [1]

Actually, in the *Smith* case, none of the Respondents offered more than two shipping documents, neither of which showed any activity by Petitioner in Arizona. Instead, APS and Smith expressly relied on their bare allegations and disclaimed any burden of proving these allegations as facts:

> It is these allegations in the Complaint which form the basis for the allegation ... that Southwest was doing business in the State of Arizona and/or has caused an event to occur in the State out of which this claim arises. *This is the basis for the Court's jurisdiction over Southwest.* ... In reviewing a Motion to Dismiss for Lack of Jurisdiction Over the Person, *this Court must accept as true all material facts as alleged* by the non-moving party. ... In this case, *the Court must consider*

---

[1] Most of the exhibits upon which Respondents rely show no facts regarding jurisdiction. For example, Respondents say that "Southwest Chemical participated in the manufacture of the ... resin ..." (Brief in Opposition at 13). It is undisputed that the entire resin manufacturing process occurred in Texas, not Arizona.

Other facts recited by Respondents relate to the forum state of Arizona but have nothing to do with Petitioner. For example, the resin was shipped to Arizona from Petitioner's Texas plant. However, all shipments were by Sinclair's arrangements with a common carrier or by the Arizona customer, which came to Texas to pick up the product. Not a single document or deposition reveals that Petitioner had any involvement in shipping, selling or marketing Sinclair's resin product.

Other facts are distorted. For example, although Petitioner chose the compounding process (Brief in Opposition at 2), no evidence shows that there was any defect in the resin, much less one related to the compounding process. APS recently admitted to the trial court that after years of extensive discovery and exhaustive laboratory tests of the pipe, APS has uncovered no evidence whatever of any improper work by Petitioner. Moreover, while Respondents tell this Court that one compounding process results in "better dispersion" (*id.*), they neglect to inform the Court that all the evidence shows that both processes provided entirely adequate dispersion. Again, this evidence has nothing to do with jurisdiction, since all of the petitioner's compounding work was done in Texas.

> *as true those allegations* contained in [plaintiff's] ... Complaint.

(APS's Response to Motion to Dismiss at 4-5, adopted by reference in Smith's Response at 3; emphasis added).

Respondents' second argument against issuing the writ of certiorari is that *Burger King Corp. v. Rudzewicz*, _____ U.S. _____, 105 S. Ct. 2174 (1985) contains the definitive statement on the burden of proof which Petitioner seeks. (Brief in Opposition at 14). Although Respondents quote *Burger King*, they do not quote a definitive statement on the issue. Nor does Petitioner find such a statement in that opinion. Nor did that case squarely present the issue. The need persists for a straightforward statement that the party asserting the Court's jurisdiction bears the burden of proof by prima facie evidence when challenged by a motion to dismiss, and by a preponderance of evidence at a trial or preliminary hearing.

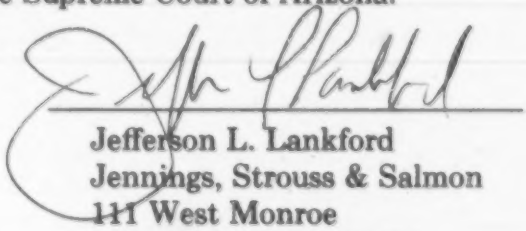
The remainder of Respondents' arguments concern the merits and are thus premature. In their zeal to convince the Court that the decision below was correct, however, the Respondents have inadvertently supported the Petition: their arguments on the merits reveal the need for a decision by this Court on the merits.

For example, Respondents argue that Petitioner's ability to foresee interstate distribution of the resin, or its knowledge of interstate shipments by the primary manufacturer, subjects Petitioner to Arizona jurisdiction. (Brief in Opposition at 7). Many courts accept this position. (Petition at 8-9). Other courts, citing *World-Wide* and other decisions of this Court, require purposeful activity by the defendant in contact with the forum rather than mere passive awareness. (*Id.* at 7-8). Respondents' argument merely illuminates the dispute; it does not conclusively resolve it.

Other arguments obscure the issues instead of illuminate them. Respondents strongly urge that Petitioner is a component manufacturer rather than a provider of services.

(Brief in Opposition at 6). The distinction matters little: service companies, component manufacturers and suppliers of raw materials are all "upstream" in the flow of commerce. (Petition at 5). All are much more remote from the plaintiff and the forum than a primary manufacturer, distributor or retailer. (*Id.* at 5, 7). Respondents overgeneralize that such upstream defendants serve a broader market than those downstream, and actively promote their product "in as many forums as possible." (See Brief in Opposition at 10-11). For example, a component manufacturer could be a company with almost entirely intrastate business, but which is fortuitously located near a General Electric, Boeing or IBM plant. If it receives a small contract from one of these interstate economic giants, is the small company amenable to suit anywhere, without limit? The Brief in Opposition raises more questions that it resolves.

For the foregoing reasons, Petitioner Southwest Chemical Services, Inc., respectfully requests that the Court issue a Writ of Certiorari to the Supreme Court of Arizona.



Jefferson L. Lankford
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5972
Counsel for Petitioner